No. 96-1585 (3)

Supreme Court, U.S.
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In The Supreme Court Of The United States

OCTOBER TERM, 1996

LEONARD EDMUNDSON, Administrator of the Estate of James Richard Turnage; ARLENE ROUSE YELVERTON; ROBERT YELVERTON; ERIN JANNELL SHIRLEY, a minor, by and through her guardian, Janice Stocks,

Petitioners,

v.

GRAYHAM KEESLER; DANIEL PETERS; JAMES P. MORGAN; CHESTER HILL; and CITY OF GOLDSBORO, NORTH CAROLINA,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITIONERS' REPLY BRIEF

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ARGUMENT

I. The Decision of the Fourth Circuit Conflicts with Johnson v. Jones.

In their Brief in Opposition, the respondents argue that "[t]he situation facing Keesler, as presented by Petitioner's evidence, was a tense, rapidly evolving crisis in which Keesler, in serious danger of injury, fired his weapon while positioned within two to three feet of a rapidly moving vehicle driven by a felony suspect determined to escape." (Br. in Opp. at 14.) Based upon this characterization of the petitioners' evidence, the respondents justify the killing of Ricky Turnage.

The respondents, however, like the Fourth Circuit, have mischaracterized the petitioners' evidence. In his affidavit, eyewitness Lionel Ginn describes Turnage's flight as follows:

> At this point in time, Officer Keesler was completely out of the way of the pick-up truck as it moved forward and rightward toward the parking lot gate. As Mr. Turnage began to drive by Officer Keesler, Keesler then shot his gun toward Mr. Turnage. As Mr. Turnage's truck continued moving forward and away from Officer Keesler, Officer Keesler ran beside the truck and shot into the driver's window two or three more times. Officer Keesler never fell, and he was not hit by the truck. When I saw him shoot the gun, Officer Keesler was not in danger of being hit by the truck. I

> could not believe what I was seeing. I could not believe Officer Keesler shot Mr. Turnage.

Considering this affidavit and the remaining evidence in the light most favorable to the petitioners, the trial court concluded that no reasonable officer in the position of Keesler or Peters could have believed that he had probable cause to believe that Turnage posed a significant threat of death or serious physical injury and, therefore, rejected the defendants' qualified immunity defense and denied their motion for summary judgment because a genuine issue of material fact existed regarding the conduct of the defendant officers.

In its decision, the Fourth Circuit ignored Ginn's affidavit and it failed to consider the facts in the light most favorable to the petitioners when it concluded that the officers' conduct "was objectively reasonable" because Keesler "was in serious danger of injury" during this incident, as he was "within two to three feet of a rapidly moving truck." By substituting its interpretation of the affidavits submitted by the petitioners for that of the district court and by failing to consider the complete picture drawn by these affidavits, the Fourth Circuit, as recognized by Judge Hall in dissent, exceeded its authority under Johnson v. Jones, ___ U.S. ___, ___, 115 S. Ct. 2151, 2159, 132 L. Ed. 2d 238, ___ (1995).

In their Brief in Opposition, the respondents discuss the affidavits of Keesler, Peters, two eyewitnesses who they claim support their position, two experts they retained, and an agent of the State Bureau of Investigation (the "SBI") as support for their version of the events that took place on July 2, 1992. Indeed, the

defendants have included the affidavit of the SBI agent in an appendix to their Brief in Opposition. Of course, to the extent these affidavits contradict the affidavits of Tyson and Ginn, they are irrelevant at this stage of the litigation, as the district court recognized when it stated as follows:

> It is of no consequence that defendants have submitted what they believe to be conclusive physical and forensic evidence in support of their version of the facts. The existence of such evidence does not automatically render contradictory eye-witness testimony worthless. Instead, the value of that evidence, as well as of that submitted by plaintiffs, turns on an assessment of credibility that only a jury can make.

II. The Decision of the Fourth Circuit Conflicts with Tennessee v. Garner and Decisions of the Seventh and Ninth Circuits.

The Fourth Circuit in this case concluded that the officers were entitled to a qualified immunity, not because the relevant law was unclear, but because the officers did not violate the law at all. Under the Fourth Circuit's decision, police officers who shoot and kill a felony suspect who is attempting to flee by automobile do not violate the Constitution as long as they are within close proximity (two to three feet) of the automobile when they shoot. Such a holding is contrary to this Court's decision in Tennessee v. Garner, 471 U.S. 1, 105 S. Ct. 1694, 85 L. Ed. 2d 1 (1985), and sets a dangerous, in fact lethal, precedent.

The respondents dismiss the petitioners' argument that this case sets a dangerous precedent by asserting that the petitioners "would extend this opinion to allow police officers to run beside and shoot at a vehicle driven by a fleeing suspect, regardless of whether the officer is within two to three feet of the vehicle, regardless of whether it is rapidly moving and regardless of whether the situation is a tense and uncertain one." (Br. in Opp. at 15.) The petitioners, however, make no such argument. Instead, the petitioners' position is that, even if a police officer is within two to three feet of an escaping vehicle, even if the vehicle is rapidly moving away from the police officer, and even if the situation is tense and uncertain, the officer is not automatically entitled to shoot and kill the driver of the vehicle, particularly when unbiased witnesses have observed that the officer was not in danger at the time he shot.

Under the Fourth Circuit's decision, however, a police officer who is in close proximity to a rapidly moving vehicle driven by a fleeing felon may shoot and kill the driver of the vehicle, regardless of the direction in which the vehicle is moving, regardless of whether the underlying crime was accomplished violently, regardless of whether the escape involving menacing a police officer or a civilian with a weapon, regardless of whether the officer could have moved safely out of the way of the vehicle, regardless of whether the officers knew that the fleeing suspect had no prior criminal record, and regardless of whether eyewitnesses have submitted affidavit testimony that the police officers were not in danger when they shot and killed the driver of the vehicle. This decision sets a dangerous precedent and is inconsistent with this Court's decision in Tennessee v.

Garner, the decision of the Seventh Circuit in Estate of Starks v. Enyart, 5 F.3d 230 (7th Cir. 1993), and the decision of the Ninth Circuit in Acosta v. City and County of San Francisco, 83 F.3d 1143 (9th Cir. 1996).

CONCLUSION

Two eyewitnesses in this case have sworn under oath that Keesler and Peters were in no danger when they shot and killed Turnage as he attempted to drive away from them. These eyewitnesses could not believe what they saw when Keesler and Peters shot Turnage. If these sworn statements are truthful, and at this stage of the litigation they must be deemed truthful, then the conduct of Keesler and Peters was unlawful. By failing to consider these affidavits, by ignoring the facts relied upon by the district court, by failing to consider all of the facts surrounding this incident in the light most favorable to the plaintiffs, and by concluding that Keesler and Peters, as a matter of law, before any discovery has been conducted, acted reasonably in this situation, the Fourth Circuit has rendered a decision that is contrary to law, that sets dangerous precedent, and that this Court should consider and reverse.

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